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SUPREME COURT. U. S.
FILED
AUG 19 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 178.

SS. *MONROSA*, Her Engines, Tackle, etc. and NAVIGAZIONE ALTA ITALIA,

Petitioners,

versus

CARBON BLACK EXPORT, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The petitioners seek to have this Court rule on the following two issues:

1. The validity and enforceability of a clause in a bill of lading issued by an Italian shipowner which provides that legal proceedings for cargo damage against the "Captain or ship owner or their agents" must be brought in Genoa; and

2. That the clause should be interpreted to include legal proceedings *in rem* although the clause refers to legal proceedings against the "Captain or shipowner or their agents" only.

Statement.

Carbon Black Export, Inc., a New York corporation, brought an action in the United States District Court for the Southern District of Texas, Houston Division against the *SS. Monrosa* and Navigazione Alta Italia, an Italian corporation to recover for damage to shipments of carbon black, totalling approximately 29,000 bags, which had been loaded on the said vessel at United States ports of Houston, Texas and New Orleans, Louisiana for discharge in Italy.

Some of the carbon black was stowed in No. 5 hold of the vessel together with drums of chemicals and other cargoes which also had been loaded in the United States. During the voyage seawater entered through wasted plates in No. 5 hold and caused serious damage to the carbon black.

At the time the carbon black was loaded on the *SS. Monrosa* bills of lading printed in English were issued by the carrier. These documents contained *inter alia* the clauses set forth on page three of the petition herein.

The damage complained of above occurred in January, 1956. Approximately three months thereafter the *SS. Monrosa* again called at ports in the United States and this action was commenced. (Since then the vessel has returned occasionally to the United States)

The libel (R. 4-11) was filed on April 3, 1956 and service was had on the same day on the petitioners herein by serving a citation on Texas Transport & Terminal Co., Inc., as agent for Navigazione Alta Italia. A general appearance was filed on behalf of the carrier on April 9, 1956. A warrant of seizure was not issued for the *Monrosa* since counsel representing the vessel agreed to file a release bond in the amount of $100,000 and also a claim of owner for the vessel. The bond and claim of owner were filed on April 9, 1956 (R. 12, 22-23).

At the time process was issued, Carbon Black Export Co., Inc. moved to take the depositions of the responsible officers of the vessel. This was vehemently opposed (R. 26). The delaying tactics of the carrier frustrated the attempts of the cargo owner to bring this matter on for prompt trial.

Several months after the commencement of this action petitioners herein made an application to the District Court to decline jurisdiction (R. 14-17) on the basis of the clauses in the bill of lading printed on page three of the petition. The District Court granted this motion and an appeal was taken. The Court of Appeals for the Fifth Circuit reversed the lower court and remanded the case to the District Court for further proceedings.

The Court of Appeals in the course of its decision reviewed both the facts and law and came to the conclusion that this action should be maintained in this country.

The choice of forum in this case should not be disturbed because:

1. This action is brought by a citizen of the United States, to wit: Carbon Black Export, Inc.

2. The cargo originated in the United States; thus all the testimony as to its condition is available in this country.

3. The cargo was loaded at ports in the United States, to wit: New Orleans, Louisiana and Houston, Texas.

4. All of the testimony as to the seaworthiness of the vessel on commencement of the above voyage is available in the United States through the carrier's agents.

5. All of the testimony as to the stowage of the cargo of carbon black is available here in the United States

through the stevedores who loaded the cargo at the ports of Houston, Texas and New Orleans, La.

6. All of the testimony with respect to the loading of other cargoes in the same compartment as the carbon black is available here in the United States through the stevedores who loaded those cargoes.

7. The bills of lading covering the carriage of the carbon black are printed in English.

8. The bills of lading incorporate the United States Carriage of Goods by Sea Act of 1936.

9. All of the log books of the *SS. Monrosa* as well as other documents pertaining to the voyage in question can be very easily produced in the courts of this country.

The Petition for Writ of Certiorari Should Be Denied.

1. The decision below is correct and in accord with controlling precedent. There is no conflict between the decisions of the Second and Fifth Circuits.

The petitioners herein request this Court to decide the questions presented because, they allege, the following three decisions decided by the United States Court of Appeals for the Second Circuit are in direct conflict with the decision of the United States Court of Appeals for the Fifth Circuit in the instant case:

> *Wm. H. Muller & Co.* v. *Swedish American Line Ltd., et al.*, 224 F. 2d 806 2 Cir., cert. denied 350 U. S. 903 (1955);[1]

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[1] The cargoes involved in this action were loaded at Gothenburg on the S.S. *Oklahoma*, a Swedish flag vessel owned by a Swedish corporation, to be discharged at Philadelphia. The *Oklahoma* never arrived in the United States as it was lost at sea.

The Geisha-Cerro De Pasco Copper Corp. v. *Knut Knutsen*, O. A. S., 2 Cir. 187 F. 2d 990 (1951);[2]

Murillo, Ltda, et al. v. *The Bio Bio, et al.*, 2 Cir. 227 F. 2d 519, (1955), aff'd 127 F. Supp. 13 (S. D. N. Y. 1955).[3]

The petitioners argue that the United States Court of Appeals for the Fifth Circuit denied their motion to have this matter referred to the Courts in Genoa on the sole ground that jurisdictional clauses are void as being against public policy. A reading of the decision of the lower court clearly points up the error of the petitioners. The Court of Appeals in its decision stated:[4] "We agree with libelant that the court below was in error in granting the motion to deny jurisdiction under the facts of this case * * *". Further, the Court emphatically distinguished the facts in this case from the facts in the *Muller* decision, *supra*, and clearly set forth the facts on which it relied in holding that this action should be maintained in this country:[5]

> "We do not find it necessary to espouse or reject the position taken by the Court of Appeals of the Second Circuit in the cases mentioned above, which are relied upon as marking a departure from this general rule. The facts before that Court in those cases were, in each instance, materially different from those before us. In addition to those already discussed, it is important to note that the contracts of carriage here were made in the United States and

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[2] The cargo involved in this action was loaded on the S.S. *Geisha*, a foreign flag vessel, in Peru to be discharged at European ports. The vessel did not touch any port in the United States.

[3] The cargoes were carried on three Swedish flag vessels owned by Swedish corporations. The cargoes were loaded at Antwerp, Belgium and were to be discharged at Arica, Chile. None of the vessels touched any port in the United States.

[4] 254 F. 2d 297, 300 (also at page 19 in the petition).

[5] 254 F. 2d 297, 301 (also at page 22 in the petition).

were partially performed here, that the bills of lading specifically adopted the Carriage of Goods by Sea Act of the United States as part of their provisions and were printed in English, tending to indicate that the parties recognized that the courts of the United States were in a good position to pass upon the rights of the parties to them. It is further noteworthy that the testimony of the crew of the *Monrosa* was sought by libelant and resisted by respondents when the crew were in Houston; and, finally respondents invoked the jurisdiction of the court below in general terms and rested upon this action several months before challenging that jurisdiction by its motion."

The same reasoning was followed by the Second Circuit. That Court did not decline to take jurisdiction of the cases cited above, mainly because the bills of lading provided that actions be litigated in foreign countries. Rather, it considered the facts in each case and then determined whether the interests of the parties, based on availability of witnesses and other factors, would be best served by a trial here or in a foreign tribunal.

The Court of Appeals for the Second Circuit in the *Muller* case, *supra*, recognized that parties can not oust a United States Court of jurisdiction by agreement and unambiguously held that each case must be judged on its own facts.[6]

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[6] 224 F. 2d 806, 808 "From this it follows that in each case the enforceability of such an agreement depends upon its reasonableness. We agree with the appellant to this extent: the parties by agreement cannot oust a court of jurisdiction otherwise obtaining; notwithstanding the agreement, the court has jurisdiction. But if in the proper exercise of its jurisdiction, by a preliminary ruling the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented. Such, essentially, was our holding in Cerro De Pasco Copper Corp. *v.* Knut Knutsen in the case of The Geisha, 2 Cir., 187 F. 2d 990. We adhere to that ruling."

The same principle was declared in the *Geisha* case.[7]

To like effect did Judge Murphy of the United States District Court for the Southern District of New York hold in the *Bio-Bio* case, *supra*.[8]

Basically the courts have and will enforce a jurisdictional clause in an agreement only where the doctrine of forum *non conveniens* can be invoked. Thus we must consider why the litigants in the three cases cited by the petitioners herein were relegated to foreign tribunals.

It is important to note that in all three cases the cargoes in question were loaded in foreign ports; in all three cases the covering bills of lading were issued in foreign lands; in none of the cases did the cargoes or vessels touch the United States; in none of the cases was any part of the contract of carriage performed in the United States. Thus all of the testimony and documents pertaining to the main issues in each case, i.e., stowage of cargo, seaworthiness of the vessel, condition of the cargo, issuance of bills of lading, and all other important matters could only be obtained outside the United States. In fact in both the *Geisha* and

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[7] 187 F. 2d 990, 991 "The court's conclusion that it was not the appropriate forum clearly did not constitute an abuse of discretion, considering these facts stated by the district judge: 'No loading of this vessel took place in any United States port. All of the cargo was to be delivered in European ports * * *. None of the crew of the Geisha are in the United States and none are planning to visit the United States' ".

[8] 127 F. Supp. 13, 16 "In the light of all of the connecting factors, the reasonableness of the limitation of tribunal to the carrier's domicile is apparent. There is no reason why this court ought not to give it consideration. Weighing thus this stipulation in the balance of conveniences, respondents have sustained the burden of making out the inconvenience of this forum."

Bio-Bio cases the libelants were not citizens of the United States.[9]

How different the facts are in the instant case where most, if not all, of the testimony as to stowage of cargoes, issuance of bills of lading, seaworthiness of the vessel, condition of the cargoes, is available right here in the United States. It can be readily recognized why the United States Court of Appeals for the Fifth Circuit, on the basis of the facts involved, held that this action must be tried in this country.

Notwithstanding the three decisions referred to, the courts in the Second Circuit are still reluctant to enforce jurisdictional clauses.[10]

Even though the United States Court of Appeals for the Fifth Circuit stated in the course of its decision that clauses which seek to oust the jurisdiction of the courts of this country are contrary to public policy and should not be enforced, it did no more than reiterate the holdings in the majority of jurisdictions in this country.[11]

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[9] Although one of the named libelants in the *Bio-Bio* case was a New York corporation, the court found that its connection with the transaction was very nominal. Judge Murphy said in this case 127 F. Supp. 13, 15: "Under circumstances of such nominal participation on the part of the only citizen of the United States involved, in addition to the consideration that testimony of such party as witness would add nothing in the face of shipping documents and evidence of weighing from distant locations, little if any support favoring retention of jurisdiction is supplied by joinder of the New York corporation as co-libelant."

[10] Chemical Carriers Inc. *v.* L. Smit & Co.'s Internationale Sleepdienst 154 F. Supp. 886, 888 "It is no longer the law that contractual provisions which purport to limit a jurisdiction which would otherwise attach are void and unenforceable. (Cases cited) Nevertheless, such agreements, particularly those calling for exclusive jurisdiction in a foreign court, are not looked upon with favor and will not be enforced by the Federal courts if they are unreasonable in themselves or in the effect they may have on the rights of the parties to the dispute. (Cases cited)"

[11] During the course of its decision the United States Court for the Fifth Circuit referred to two leading texts, *Corpus Juris Secun-*

The state courts of the State of New York, within which the United States District Court for the Southern District of New York and the United States Court of Appeals of the Second Circuit sit, agree with the majority rule.[12]

In fact the United States Court of Appeals for the Fifth Circuit in considering jurisdictional clauses as against public policy followed the decision of this court in *Insurance Company* v. *Morse,* 87 U. S. 445. In that case, the State of Wisconsin provided by statute that, as a condition precedent to doing business in that state, all foreign corporations must agree not to remove any action to the federal courts. The Insurance Company did agree to this but when sued allegedly violated the agreement by removing the case to the federal court. The Supreme Court of Wisconsin

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dum and *American Jurisprudence.* See 254 F. 2d 297, 301, (also at page 21 of the petition herein)

> "The rule is thus epitomized in the headnote of the article on Contracts, 17 C. J. S. §229, p. 603: 'Contract provisions intended to oust courts of their jurisdiction in advance, as distinguished from provisions merely imposing conditions on the exercise of the right to sue, are void. This rule has been frequently considered in determining the validity of contracts as to venue, periods of limitation, notice or demand, and evidence.'
>
> "And see also 14 *Am. Jur., Courts,* §196, pp. 389-390, which thus summarizes the rule: 'Both in England and the United States it has been decided in a great number of cases, and conceded in an equally large number of other cases, to be settled law, that the jurisdiction of the courts cannot be ousted by the private agreement of individuals made in advance, that the private persons are incompetent to make any such binding contracts, and that all such contracts are illegal and void as against public policy.'
>
> "Cited to both texts are a number of decisions of the Supreme Court of the United States; and cf. our decision in Burt *v.* Isthmus Development Co., 1955, 218 F. 2d 353, 356, cert. den. 349 U. S. 922."

[12] In re application of Hamburg-American Line, 135 Misc. 715, 238 N. Y. S. 331 (1930); aff'd 228 App. Div. 802; 239 N. Y. S. 914; *Parker* v. *Kraus Co. Ltd.,* 157 Misc. 667, 284 N. Y. S. 478; aff'd 249 App. Div. 718, 292 N. Y. S. 955.

upheld the agreement, but this court thereupon reversed with no qualification that the agreement would have been valid if reasonable. In its decision this court promulgated the principle that citizens of this country have an absolute right to litigate their grievances in our courts—a right which they can not barter away. Consequently, this court ruled that any agreement to do so must be considered illegal and void.[13]

Thus the Court of Appeals in this case consciously adhered to a ruling of this court enunciated eighty-four years ago.

2. The jurisdictional clause under discussion does not preclude a cargo owner from bringing a suit *in rem* in the courts of the United States.

The petitioners' claim that clause 27 in the bill of lading is sufficiently broad to include both suits *in personam* and *in rem*. However, by its own language this clause refers to

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[13] 87 U. S. 445, 451

> "Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot as was held in *Cancemi's Case*, be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.
>
> "That the agreement of the insurance company is invalid upon the principles mentioned, numerous cases may be cited to prove. They show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void."

proceedings against "the captain or shipowners or their agents" only.

It is a universally recognized rule of law that if there is any ambiguity in a contract it must be resolved against the person preparing that contract.[14]

Thus the glaring omission of suits *in rem* can only have one interpretation, that is, the carrier intended to submit its vessels to the jurisdiction of our courts.

The petitioners herein stress that the United States Court of Appeals for the Second Circuit held in the *Bio-Bio* case that jurisdictional agreements included actions *in rem* as well as actions *in personam*. We must correct the petitioners' impression of that case. Although the S. S. *Bio-Bio* was named as respondent in the libel no process was ever issued against the vessel; no claim of owner was filed in the proceeding on its behalf; no bond was posted on its behalf and no letter of guarantee was issued by anyone on its behalf. In other words, there was no *in rem* proceeding in that case at all. The court records have been searched and there is nothing to substantiate the petitioners' contention.

It has long been recognized that a party who has a mari-

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[14] 17 Corpus Juris Secundum 751-753:

"§324. Construction against Party Using Words • • •

Where a contract is ambiguous it will be construed most strongly against the party preparing it or employing the words concerning which doubt arises, the reason for the rule being that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage; • • •

and continuing at page 754:

"• • • *Printed forms.* The rules just stated are of course peculiarly applicable where the contract is on a printed form prepared by one of the parties."

time lien against a vessel has the right to proceed *in rem* in any jurisdiction where the vessel can be found.[15]

Certainly the petitioners cannot be serious in their argument that the jurisdictional clause in the bill of lading nullifies the right of an injured party to proceed against a vessel.

3. The decisions in *Smith* v. *The Mormacdale,* 3 Cir. 198 F. 2d 849 (1952); *Bennett* v. *S. S. Mormacteal,* et al., 2 Cir. 254 F. 2d 138 (1958) affirming 160 F. Supp. 840; *Samuels* v. *Munson Steamship Line,* 63 F. 2d 861 (1933), referred to on pages 11 and 12 of the petition herein have no applicability to the issues involved in this case.

In those cases a longshoreman brought an action *in rem* to recover for personal injuries. The longshoreman's rights are governed by the Longshoremen and Harbor Workers' Compensation Act, 33 U. S. C. A. §901, *et seq.* In all of those cases the libelant's employer was also the vessel owner. The courts which decided the cases were interpreting the Longshoremen and Harbor Workers' Compensation Act. They in fact held that under this Act a longshoreman could not bring an action against a vessel which was owned by his employer but that his remedy was exclusively that provided for under the aforementioned Act.

Here the question is only an interpretation of a contract pertaining to procedure and not the construction of a Federal statute.

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[15] Motor Distributors Ltd. *et al. v.* Olaf Pedersen's Rederi A/S 239 F. 2d 463, 467

> "Moreover, something deeply significant in the whole field of maritime law is here at stake. With respect to ocean-going carriers it seems that one of the most universally recognized rules of law is that which gives the right to libellant, possessing a maritime lien against a vessel, to proceed *in rem* in the jurisdiction where the vessel is found."

It is respectfully submitted that the foregoing considerations require denial of the Petition for Writ of Certiorari in this case.

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